# INDEX

## CITATIONS

Cases: Page

Cases—Continued Page



Statutes:

Statutes—Continued

Miscellaneous: Page

# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-1178

GULF STATES UTILITIES COMPANY, PETITIONER

*v.*

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA, RESPONDENTS

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL POWER COMMISSION IN SUPPORT OF PETITIONER

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) [1] is reported at 454 F.2d 941.

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[1] "Pet. App." references are to the appendix to the petition filed by Gulf States Utilities Company, No. 71-1178. "J.A." references are to the Joint Appendix in the proceeding before the Court below.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on October 12, 1971. The court of appeals' order denying rehearing (Pet. App. 31a) was issued December 15, 1971. The petition for a writ of certiorari was filed on March 11, 1972. On May 30, 1972, this Court granted the petition seeking review of the judgment of the court of appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

## QUESTION PRESENTED

Whether the Federal Power Commission should be required to delay public utilities' financing in order to consider antitrust allegations which it can fully consider and remedy in other proceedings under the Federal Power Act.

## STATUTES INVOLVED

Sections 202, 203, 204, 205, 206, 306, 307, and 313 of the Federal Power Act, 16 U.S.C. §§ 824a, 824b, 824c, 824d, 824e, 825e, 825f, and 825*l*, and Section 11 of the Clayton Act, 15 U.S.C. § 21, are set forth at Pet. App. 43a-59a. The following statutes are set forth in this brief's Appendix *infra*, pp. 29-62: Section 207 of the Federal Power Act, 16 U.S.C. § 824f; Sections 5(2)(a)(i) and 20a of the Interstate Commerce Act, 49 U.S.C. §§ 5(2)(a)(i) and 20a; Sections 6, 7, 9, and 10 of the Public Utility Holding

Company Act of 1935, 15 U.S.C. §§ 79f, 79g, 79i, and 79j; and Sections 2, 3, 7, and 8 of the Clayton Act, 15 U.S.C. §§ 13, 14, 18, and 19.

## STATEMENT

This case involves an order of the Federal Power Commission (Commission) issued pursuant to Section 204 of the Federal Power Act, 16 U.S.C. § 824c, authorizing Gulf States Utilities Company (Gulf States) to issue 30 million dollars of first mortgage bonds. The order was issued without a hearing on allegations that Gulf States earlier had engaged in anti-competitive conduct and that such conduct would be financed or refinanced through the proposed sale of bonds. The Court below remanded the Commission's decision and held that the Commission is required to consider antitrust issues in a proceeding under Section 204 before authorizing a public utility's securities issuance, unless it denies or defers consideration of such issues for reasons clearly stated.

### 1. The Proceeding Before The Commission

On October 12, 1970, Gulf States, a public utility subject to the Commission's jurisdiction, filed under Section 204 an application proposing to sell 30 million dollars of first mortgage bonds at competitive bidding (J.A. 1-52). The application stated that the proceeds from the issuance would be used "to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of date of issuance."

(J.A. 5). On October 16, 1970, the Commission noticed the application and provided opportunity for the filing of protests and petitions to intervene (J.A. 53).

On November 2, 1970, the Cities of Lafayette and Plaquemine, Louisiana (Cities), filed a protest and petition to intervene (J.A. 54-160), alleging that Gulf States in concert with Louisiana Power & Light Company (LP&L) and Central Louisiana Electric Company (CLECO) (Companies) had engaged in activities "apparently violative of the antitrust laws, the Federal Power Act, and the Public Utility Holding Company Act of 1935," and alleging that such activities would be "financed or refinanced" by the proposed sale of bonds (J.A. 56). The activities complained of included litigation before federal and state courts and the Louisiana Public Service Commission, lobbying campaigns in Congress and the Louisiana legislature, and a statewide public relations campaign (J.A. 71-75), in opposition to the grant of a Rural Electric Administration (REA) loan to the Louisiana Electric Cooperative (LEC) for the construction of a generating station and transmission line (J.A. 71).[2] Cities further alleged that such activities delayed advancement of funds by REA for five years, resulting in the loan's inadequacy to cover the cost of transmission lines as well as generating facilities. Cities alleged that this left LEC to negotiate with the Companies for transmission service and that the

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[2] Cities' interest was based on a 1968 pooling and interconnection agreement among LEC, Cities, and Dow Chemical Company (Dow) (J.A. 81-117).

Companies presented only restrictive contract proposals in such negotiations (J.A. 62-5).

On November 12, 1970, Gulf States filed an answer denying any violation of antitrust laws, the Federal Power Act, or the Public Utility Holding Company Act, and contending that Cities' allegations were outside the scope of proceedings under Section 204 (J.A. 165-76).

By order dated December 3, 1970, the Commission granted Cities' intervention, found the activities alleged by Cities to be irrelevant to Gulf States' purpose of issuing bonds to refund short-term inbebtedness, denied Cities' request for a hearing, and authorized the proposed issuance and sale of bonds (Pet. App. 32a-37a).[3] On December 16, 1970, Cities filed an application for rehearing (J.A. 188-95), which was denied by the Commission on January 13, 1971 (Pet. App. 41a- 42a).

### 2. The Court Of Appeals Decision

On review, the Court below remanded the order of the Commission as "plainly inconsistent with its duties as developed in *Denver & Rio Grande*" (Pet. App. 16a). In *Denver & Rio Grande Western R.R.* v. *United States*, 387 U.S. 485, this Court held that the ICC is required, as a general rule, to consider the control and anticompetitive consequences before approving stock issuances under Section 20a(2) of the Interstate Commerce Act, 49 U.S.C. § 20a(2). The

[3] By supplemental order dated December 9, 1970, the Commission approved as reasonable the proposed price and interest rate of the bonds (Pet. App. 38a-40a).

Court below rejected the Commission's interpretation, first articulated in *Pacific Power & Light Company*, 27 FPC 623, that the scope of its authority under Section 204 is limited to consideration of issues concerning the financial integrity of the applicant and its ability to perform its public utility responsibilities (Pet. App. 16a-19a). Recognizing that "security issues to provide funds for a utility's construction must be decided in a time frame much more limited than often contemplated for antitrust litigation," the Court below indicated that the Commission has a broad discretion to approve a securities issuance while reserving decision on or deferring consideration of the antitrust issues until a subsequent proceeding (Pet. App. 22a-23a).

The Court below consolidated this case with its review of two SEC orders approving security issuances by LP&L without a hearing on Cities' allegations of antitrust violations by LP&L similar to those raised in the instant case. While remanding the FPC's order, the Court affirmed the SEC orders approving LP&L's security issuances under Section 7 of the Public Utility Holding Company Act, 15 U.S.C. § 79g. Distinguishing its earlier *Municipal Electric Ass'n. of Massachusetts* v. *S.E.C.*, 413 F.2d 1052, decision that the SEC must consider antitrust matters in a proceeding under Section 10 of the Public Utility Holding Company Act, 15 U.S.C. § 79j, to authorize acquisition of securities or utility assets, the Court pointed out that the standard for SEC approval under the latter section explicitly involves issues of interlocking relations and concentration of control (Pet.

App. 25a-26a). The Court distinguished the duty of the SEC from that of the FPC to consider allegations of anticompetitive conduct in approving securities issuances on the ground that, unlike the SEC, the FPC has regulatory jurisdiction over the operations of companies (Pet. App. 26a-28a).

## SUMMARY OF ARGUMENT

Section 204 of the Federal Power Act prohibits the issuance of securities by a public utility without prior authorization of the Commission. The controversy here concerns the scope of the Commission's responsibilities under Section 204, specifically, whether the Commission is required to consider antitrust allegations before authorizing a securities issuance.

### A.

In exercising its control over interconnections, security or asset acquisitions, mergers, rates, practices, and services of public utilities, the Commission has full authority to consider antitrust allegations and to prevent or remedy antitrust violations related to such matters. The Commission may also investigate on its own motion or another's petition the possibly unlawful conduct of public utilities. In view of these protections, the Commission should not be required to consider antitrust allegations in authorizing securities issuances. A proposed sale of securities gives rise to no anticompetitive effects which would not come within the above areas of the Commission's authority. Parties should not be able to delay public

utilities' financing, which is vital to the public's interest in adequate energy, simply by alleging that some allegedly improper conduct will be financed or refinanced by the proceeds of the proposed sale. The decision of the Court below permits this broad claim with respect to any securities issuance and turns Section 204 into a forum for general antitrust litigation. Public utilities are already subject to multiplicitous antitrust litigation, and the decision of the court below adds another arena, to the probable detriment of consumers relying on public utilities to satisfy their increasing energy demands.

The Clayton Act does not suggest a connection between antitrust and securities issuances, as it does for acquisitions, prices, practices, etc., activities the Commission is fully able to directly review for anticompetitive effects. The antitrust laws are intended to foster competition, yet public utilities whose financing is delayed by the decision of the Court below will be unable to compete against companies regulated by States or the SEC for financing in the money market, and that will actually reduce competition in the public utilities sector. The jurisdiction of the Federal Power Commission under Section 204 is limited to approving the issuance of any security by a public utility not subject to the jurisdiction of the SEC (Section 318 of the Federal Power Act, 16 U.S.C. § 825q) and not regulated by the laws of the state under which the company is organized and operating (Section 204(f), 16 U.S.C. § 825c(f)).

The decision of the Court below was based on this Court's ruling in *Denver & Rio Grande, supra,* that

the ICC must consider antitrust claims in approving the securities issuances of common carriers, though this Court stated that the most significant question in that case was whether the carrier's stock should be acquired by another carrier. Applying this case to the Commission was erroneous because of differences between the agencies' statutory authority to consider the anticompetitive effects in all stock acquisition cases, and between the two agencies' earlier interpretations of the scope of their authority over stock issuances. In view of the Commission's full authority under other provisions, this Court's requirements of the ICC should not be read into Section 204 of the Federal Power Act.

B.

In exercising its authority over securities issuances, the Commission has consistently construed the scope of its responsibilities under Section 204 to be limited to the protection of the consumer and investor by prevention of any impairment of a company's financial integrity and ability to perform its public utility responsibilities. The legislative history shows clearly that these were the only purposes of Section 204. Accordingly, the Commission in this case properly found that allegations that Gulf States had engaged in anticompetitive activities were irrelevant to the proposed sale of bonds to refund short-term indebtedness.

The Court below erroneously failed to give weight to the Commission's interpretation and to the evidence of Congress' intent and held that the Commission is required to consider antitrust allegations in

proceedings under Section 204. This requirement that such proceedings be opened up to the complexities of antitrust litigation, besides being legally unfounded, can defeat the purposes of Section 204. The money market and ever-increasing demand for electric energy necessitate expedition in Section 204 proceedings if public utilities are to maintain financial soundness and meet their responsibilities to the public.

The decision of the Court below was also wrong in light of its concurrent decision, and correct decision we submit, that the SEC need not consider antitrust allegations in approving securities issuances of holding companies. The SEC's authority over such securities stems from Title I of the Public Utility Act of 1935 (Public Utility Act); the Commission's similar authority under Section 204 was enacted as part of Title II of that act. Congress' primary concern in enacting the Public Utility Act was to remedy the financial abuses of holding companies, which were easily hidden within their complex corporate structures. As a result, Congressional requirements for the Commission's scrutiny of security issuances of some, but not all, public utilities were not nearly as extensive of those for the SEC. Contravening this clear legislative purpose, the effect of the decision below is to encourage public utilities to adopt a holding company structure or to bring themselves within a State Commission's jurisdiction, in order to facilitate their quest for adequate financing to meet their responsibilities as public utilities. In either case, the FPC would lose jurisdiction under Section 204.

## ARGUMENT

### THE FEDERAL POWER COMMISSION SHOULD NOT BE REQUIRED TO DELAY PUBLIC UTILITIES' FINANCING IN ORDER TO CONSIDER ANTITRUST ALLEGATIONS WHICH IT CAN FULLY CONSIDER AND REMEDY IN OTHER PROCEEDINGS UNDER THE FEDERAL POWER ACT.

#### A. The Commission Should Be Permitted To Consider Antitrust Allegations Under The Federal Power Act In Proceedings Where Such Allegations Are Directly Related And Where The Commission Can Order An Appropriate Remedy.

In 1935, with the financial community and the consumer still reeling from the loss of public confidence which resulted from the stock market crash of 1929 and following an extensive federal investigation of public utilities,[4] Congress enacted the Public Utility Act. Title I of that act placed the financial practices of public utility holding companies[5] under strict regulation of the SEC, and Title II authorized the Commision to regulate both the financial practices and operations of some, but not all, public utilities, as defined in Section 201 of the Federal Power Act, 16 USC § 824, as the Court below recognized (Pet. App. 17a-19a). The issue before this Court requires a determination of wheth-

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[4] See Federal Trade Commission, *In Response to Sen. Res. No. 83, Monthly Reports on the Electric Power and Utilities Inquiry*, S. Doc. No. 92, Pts. 1-84II, 70th Cong., 1st Sess. (1928-36).

[5] For the definition of "holding company," see 15 U.S.C. § 79b(a)(7).

er the Commission is required to consider antitrust allegations when authorizing securities issuances, the one aspect of its control over financial practices which does not give rise to antitrust issues and which requires expedition, when it has full authority to consider and to remedy antitrust violations by public utilities by means of its various controls over operations. The proliferation of forums in which antitrust allegations can presently be raised against regulated industries [6] makes this determination particularly important.

It is well established that an administrative agency may consider antitrust policies in carrying out its regulatory functions in the public interest. *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244. Under the doctrine of primary jurisdiction, cases involving regulated industries and antitrust issues are usually referred by this Court and others to such agencies for the initial decision. *Pan American World Airways* v. *United States*, 371 U.S. 296, *U. S. Navigation Co.* v. *Cunard S.S. Co.*, 284

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[6] As a result of the decision below, at least two, and possibly three, federal agencies will be considering the cities' allegations of anti-competitive practices. In addition to the Federal Power Commission's proceeding, the Department of Justice has issued Civil Investigative Demands to determine whether there is any basis for filing an antitrust complaint in a district court. See 15 U.S.C. 1312. Moreover, the Atomic Energy Commission may be called upon to consider anti-competitive practices in connection with nuclear plant licensing cases. *Louisiana Power & Light Co.*, Docket Nos. 50-382A and 50-383A. See 42 U.S.C. 2135. At the present time, no means of consolidating discovery and the taking of evidence among the several agencies has been devised.

U.S. 474, *Carter* v. *American Tel. & Tel. Co.*, 365 F.2d 486, certiorari denied, 385 U.S. 1008. Yet it is not clear when an agency is *required* to consider antitrust issues in securities issuances, as is apparent from the self-contradictory decision of the Court below, which found the Commission required and the SEC not required to consider antitrust claims in authorizing securities issuances. Compare *Denver & Rio Grande, supra* (consideration of antitrust claims required for ICC approval of securities issuance); *Cities of Statesville* v. *A.E.C.*, 441 F.2d 962 (CA DC) (consideration of antitrust claims not required for AEC provisional licensing); *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953 (CADC); *City of Pittsburgh* v. *Federal Power Commission*, 237 F.2d 741 (CADC) (consideration of antitrust claims required for the Commission's pipeline certification). In view of the broad antitrust protections of other provisions under the Federal Power Act and the contrasting narrow responsibilities of the Commission under Section 204, see pp. 20-25, *infra*, we submit that the Commission should not be required to consider antitrust allegations under Section 204. The decision of the Court below simply adds unnecessarily to the numerous forums in which antitrust allegations must be considered and increases the possibility that public utilities will be unable to raise capital and expand their facilities to meet the public's increasing energy needs.

Allegations of anticompetitive conduct would be properly raised and fully considered by the Commis-

sion in proceedings to order an interconnection under Section 202, 16 U.S.C. § 824a, to approve acquisitions or any merger under Section 203, 16 U.S.C. § 824b, to review rates under Sections 205 and 206, 16 U.S.C. §§ 824d and 824e, to review charges of unduly discriminatory rates or practices under Section 205, 16 U.S.C. § 824d, or to review charges of inadequate service under Section 207, 16 U.S.C. § 824f. Under each of these sections the Commission has jurisdiction to compel certain action by a public utility. If anticompetitive conduct or effects were established in such proceedings and were not outweighed by other factors which determine the public interest, the Commission could order a remedy *directly related* to the facts proven, *e.g.*, order an interconnection, deny authorization of acquisitions, order a change in rates, etc. The instant case demonstrates this point very clearly. Under Section 202, Cities could have requested the Commission to order a compulsory interconnection between the Cities and Companies, a direct and adequate solution to Cities' need for transmission services. It should also be noted that while any proven past antitrust violations would be considered by the Commission in determining whether an interconnection order would be in the public interest, Cities could seek this remedy on other grounds as well.

In addition to these specific regulatory controls over operations, the Commission has broad authority to institute a proceeding to investigate practices or conduct of public utilities subject to its jurisdiction which might be unlawful, upon any person's complaint under

Section 306 or upon its own initiative under Section 307, 16 U.S.C. §§ 825e and 825f. Accordingly, the Commission is presently investigating allegations of anticompetitive conduct by Gulf States in a proceeding instituted under Sections 202, 306 and 307, 16 U.S.C. §§ 824a, 825e, and 825f. *The Cities of Lafayette and Plaquemine, Louisiana* v. *Gulf States Utilities Company, Louisiana Power & Light Company, Central Louisiana Electric Company*, FPC Docket No. E-7676. Upon a finding of antitrust violations in any such proceedings, the Commission can exercise its authority over operations, discussed *supra* at pp. 13-14, and/or parties can seek other remedies in the courts.

Antitrust allegations can be relevant in proceedings to order interconnections, to approve acquisitions, mergers, rates or practices of public utilities, or to investigate complaints about public utilities, because monopolistic or discriminatory practices can be directly prevented or remedied in all these matters. In contrast, a company's mere proposal to raise funds for a lawful object does not give rise to antitrust issues. Any party can raise a claim that the proceeds would be used to "finance or refinance" any conduct, anticompetitive or not, as Cities alleged in this case (J.A. 56). In order to prevent the potential misuse of such a broad claim and a delay in necessary financing, the Commission should be permitted to consider allegations of actual anticompetitive conduct in the pertinent regulatory contexts named above and apply such remedies as it is authorized to order. To the extent that the Commission is authorized to con-

sider and remedy antitrust matters, it "should be free to fashion its own rules of procedure and to pursue methods of inquiry capable of permitting it to discharge its multitudinous duties." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143. This established principle of broad procedural authority has been upheld in a variety of applications, *FCC* v. *Schreiber*, 381 U.S. 279, 290, and based on it, this Court affirmed in *Pottsville* the FCC's choice of proceeding to consider several applications for a license, and in *Schreiber* the FCC's prescription of procedure for investigations. Similarly, the Commission should be permitted to utilize the proceedings it determines to be best suited for considering and remedying antitrust claims, for "administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adopted to the peculiarities of the industry and the tasks of the agency involved." 381 U.S. at 290. The Commission is most aware of public utilities' problems in meeting the energy demands in this country and is fully cognizant of its authority under other sections of the Federal Power Act, as is demonstrated by FPC Docket No. E-7676, *supra*. Since private and public interests can best be protected in other ways, the Commission should not be required to consider antitrust issues under Section 204.

It should be noted that the Clayton Act, the most explicit expression of Congress' antitrust concerns, forbids acquisitions, mergers, and discriminatory prices or practices for anticompetitive purposes, but

does not even allude to the issuance of securities for such purposes. See Sections 2, 3, 7, and 8, 15 U.S.C. §§ 13, 14, 18 and 19. Congress apparently recognized that a company should be able to raise capital as it sees fit and should be subject only to direct review of actual anticompetitive practices. The wisdom of this approach is even more compelling in the case of public utilities, which might be prevented from financing the facilities needed to meet the energy requirements of consumers if the approval of securities issuances is delayed while broad antitrust claims are entertained.

The Court below based its contrary decision entirely on the inapposite opinion of this Court in the *Denver & Rio Grande* case, *supra*, which construed the ICC's duty to consider antitrust matters under Section 20a of the Interstate Commerce Act, 49 U.S.C. § 20a. The order under review was the ICC's authorization for Railway Express Agency, Inc. (REA), to issue to Greyhound common stock equalling a 20 percent interest in REA. Whereas the similarity between the language of Section 20a of the latter act and Section 204 of the Federal Power Act is apparent, this Court's basis for its decision in that case reveals its inapplicability to the Commission's duties under Section 204 of the Federal Power Act. First, this Court was primarily concerned with the anticompetitive potential of the *acquisition of stock of one transport company by another*, stating that "the most significant question which the ICC must face is whether it is in the public interest that REA continue to be owned by other transport companies, and specifically by Greyhound." 387 U.S. at 507. If such a

question arose when a public utility issued stock, the Commission would consider it under Section 203 of the Federal Power Act, 16 U.S.C. § 824b, which requires Commission approval of one utility's acquiring any security of another. In such a proceeding the Commission does consider potential anticompetitive effects. *Commonwealth Edison Co. and Central Illinois Electric and Gas Co.*, 36 FPC 927, affirmed *sub nom. Utility Users League* v. *Federal Power Commission*, 394 F.2d 16 (CA 7), certiorari denied, 393 U.S. 953. In contrast to the Federal Power Act, this Court recognized in *Denver & Rio Grande* that the ICC has comparable authority over securities acquisitions under Section 5(2)(a)(i) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(a)(i), only when a carrier *acquires control* of another carrier through stock ownership. Whereas the ICC would thus have to consider anticompetitive effects of stock acquisitions under its Section 20a authority over stock issuances where the threshold requirement of control was not met, as in *Denver & Rio Grande*, the Federal Power Commission would evaluate such issues fully under its Section 203 authority over stock acquisitions. This obviates the need for a comparable requirement in Section 204 proceedings.

A second important and equally inapplicable basis for this Court's decision in *Denver & Rio Grande* was the ICC's history of weighing anticompetitive consequences in other proceedings under Section 20a of the Interstate Commerce Act, 387 U.S. at 494-6. Just as this Court gave great weight to the ICC decisions

demonstrating its own past interpretation of that statute, it should give effect to the Commission's consistent interpretation of the limited scope of its authority under Section 204. See pp. 20-22, *infra*.

This Court has recognized that the Commission has not been granted the power to adjudicate antitrust issues as such, outside the regulatory powers it possesses. *California* v. *Federal Power Commission*, 369 U.S. 482, 486. The decision of the Court below that the Commission must consider attenuated antitrust allegations under Section 204 will actually defeat that principle, since any anticompetitive activity could allegedly be financed by the proceeds of any securities issuance. The decision can also defeat the antitrust laws' purpose of fostering competition, since companies whose securities issuances can be authorized only after lengthy Section 204 proceedings will be unable to compete with utilities which are subject only to regulation by the States or the SEC.

These anomalous results of the decision of the Court below can only serve to defeat the public's interest in the continued viability of public utilities which are responsible to supply the country's energy demands and of a regulatory scheme designed to protect both consumer and investor. This Court's decision ignores the complete and adequate antitrust safeguards of the Federal Power Act as a whole, despite the familiar rule of law that a statute should be construed as a whole. *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 544. It simply adds unnecessarily and to the detriment of consumers one more instance in which antitrust allegations must

be entertained and provides one more example of the recognized difficulty in the accommodation of antitrust policy to regulatory policy. See 3 Davis, Administrative Law § 19.05, at 25; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 663-4 (separate opinion); *Carter* v. *American Tel. & Tel. Co., supra* at 493. It is clearly not in the public interest that consumers dependant upon public utilities should be subject to multifarious litigation of antitrust issues and uncertainty in matters of capital financing.

**B. Section 204 Of The Federal Power Act Contains No Requirement That The Commission Consider Antitrust Allegations When Authorizing The Issuance Of Securities.**

Section 204(a), 15 U.S.C. § 824c(a), prohibits the issuance of securities by a public utility without prior authorization of the Commission and requires the Commission to authorize a securities issuance if it finds:

> * * * that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. * * *

The scope of the Commission's responsibility under Section 204 has not been interpreted by any court before the instant case, but the Commission has con-

strued it to be limited, saying in *Pacific Power & Light Company, supra* at 626:

> The plain purpose of Section 204 is to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities.

In keeping with that interpretation, the Commission declined to consider in that case the details of the planned expenditures of the proceeds of the proposed sale of securities. The Commission further elucidated the factors it could consider in a Section 204 proceeding (*id.* at 628):

> In testing a security issue by the statutory standard, the Commission must satisfy itself, of course, that the object is lawful and within the corporate purposes. Beyond that, we must inquire whether the contemplated investment would impair the company's ability to perform its normal functions as a public utility. The Commission might look to whether the investment is so improvident, frivolous, or speculative, that it threatens to squander the corporate substance without reasonable hope of return.

Significantly, the Commission has consistently followed this interpretation as to the limited scope of Section 204. See *e.g. Idaho Power Company*, 28 FPC 967, *Black Hills Power & Light Company*, 28 FPC 1121, *Black Hills Power & Light Company*, 31 FPC 1605.

This Court has recognized the importance of such interpretation by an administrative agency, stating that "(w)hen faced with a problem of statutory con-

struction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16. In an earlier case precisely on point with the case at bar, this Court stated that an agency's interpretation in any case is entitled to great weight and construed the Motor Carrier Act of 1935 as giving the ICC only limited authority to regulate the qualifications and hours of employees, in keeping with the ICC's interpretation. *United States* v. *American Trucking Ass'ns, supra* at 549.

The legislative history of Section 204 fully supports the Commission's interpretation. Throughout the Congressional reports and testimony, the only concern expressed was protection of the public interest by the prohibition of security issues which are financially unsound. The Senate Committee Report explained the relationship of the public interest to financial practices under Section 204 as follows:

> Control over capitalization of operating utilities is plainly an essential means of safeguarding the public against unsound financial practices which make impossible the proper and most economic performance of public-utility functions.[7]

In a similar vein, and without specifically mentioning the term "public interest," the House Committee Report explained the limits of the Commission's authority over security issuances:

> Approval must be given if the issue is for a lawful purpose, consistent with the proper per-

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[7] S. Rep. No. 621, 74th Cong., 1st Sess. 50 (1935).

> formance by the applicant of service as a public utility.[8]

In explaining Title II of the Public Utility Act on the floor of the House, a member of the House Committee similarly emphasized its effect on public utilities' financial practices, stating:

> These provisions, if rightly and sanely administered, will give greater credence to what public utilities do; it will make their reports and their accounts reliable; it will add to the value of their stocks and their securities; such stocks and securities will be founded more certainly and more securely on real values and freer from the suspicion of manipulation, deception, and watered values.[9]

These provisions were aimed at ending the many abuses of utility companies in connection with security issuances, which were revealed after the extensive investigation of the Federal Trade Commission (FTC) leading to passage of the Holding Company Act.[10] The FTC report did not refer to antitrust problems in security issuances.

Given the public's obvious interest in sound financial practices of public utilities, Congress' use of the phrase "compatible with the public interest" in Section 204 as a standard for testing the financial

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[8] H. Rep. No. 1318, 74th Cong., 1st Sess. 28 (1935).

[9] 79 Cong. Rec. 10379 (1935) (remarks of Congressman Lea of California).

[10] See Federal Trade Commission, *Summary Report on Economic, Financial, and Corporate Phases of Holding and Operating Companies of Electric and Gas Utilities*, S. Doc. No. 92, Pt. 72-A, 70th Cong., 1st Sess. 350-63 (1935).

soundness of securities issuances should not be lifted out of and expanded beyond that context. As this Court stated in the *American Trucking* case, *supra*, "a few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" 310 U.S. at 544. No broad legislative intent was indicated in 1935. In light of the limited concern of Congress over utilities' security issuances, the Court below should have adhered to its own recent decision in *Cities of Statesville* v. *A.E.C.*, *supra*, wherein it affirmed an order of the AEC granting a provisional license for an applicant's nuclear reactors under Section 104(b), without considering anticompetitive claims. The Court held that the AEC is not required to consider antitrust implications in applying a "public interest" standard in such proceedings, although it must in others, saying (441 F.2d at 972):

> [I]n reading the legislative history of this Act, one can find many examples of the drafters' intent to narrowly limit antitrust considerations to specific portions of the statute while expanding health and national security considerations of the Act as a whole.

The legislative history of the Federal Power Act cited above shows clearly that Congress narrowly developed the "public interest" standard with respect to securities issuances, intending only to include considerations of a company's financial integrity and ability to meet its public utility responsibilities.

Congress' intent to safeguard the public's interest in sound financial practices of public utilities and in their resulting capability to perform their public utility functions would actually be defeated by a requirement that the Commission consider antitrust allegations before authorizing security issuances. As the Commission stated in *Pacific Power & Light Company*, *supra* at 629:

> It should also be observed that procedures for considering security issues must be expeditious if, in view of changing market conditions, utilities are to be able to raise money needed to carry out their responsibilities.

These considerations have continuing validity, in view of the necessity that public utilities be able to compete in the money market in order to meet the ever-increasing demands for electric energy.[11] Even the Court below recognized that security issues to provide funds for a utility's construction must be decided in a time frame much more limited than that often contemplated for antitrust litigation. (Pet. App. 22a-23a).

Despite the Commission's interpretation and specific evidence of Congressional intent, the Court below found controlling this Court's decision in the *Denver & Rio Grande* case, *supra*. As we have explained, see pp. 17-19, *supra*, the reasoning and

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[11] See *e.g.* Oster, "Economic Dimensions of the Seventies: Their Implications for the Utilities," in *Utility Regulation During Inflation* 115-133 (Seminar on the Economics of Regulated Industries During Inflation, 2d, Occidental College, 1970).

result of that case are inapplicable to the Commission's actions under the Federal Power Act.

The decision of the Court below that the SEC generally is not required to consider antitrust allegations in approving a security issuance of a public utility holding company or its subsidiary, while such consideration is required of the Commission, works the anomalous result that the securities of public utilities are subject to closer scrutiny than those of public utility holding companies. This contravenes the known fact that in enacting the Public Utility Act, Congress' primary concern was with holding companies. Most of the legislative history refers to Title I of the Public Utility Act, and the many "evils" of holding companies' financial practices were expressly enumerated in the original bill. See 79 Cong. Rec. 10363 (1935) (remarks of Congressman Wolverton of New Jersey). Comparison of Sections 6 and 7 of Title I, 15 U.S.C. § 79f and 79g, with Section 204 of Title II, 16 U.S.C. § 824c, shows clearly Congress' intent that the securities of a holding company should receive more exacting scrutiny, though limited under both titles to the financial soundness and valid corporate purpose of the proposed issuance. We agree with the Court below that the anticompetitive effects of the acquisition of stock by a holding company are adequately reviewable under Sections 9 and 10 of Title I, 15 U.S.C. §§ 79i and 79j, and assert that a similar distinction between stock acquisitions and issuances is present in Sections 203 and 204 of Title II, 16 U.S.C. §§ 824b and

824c. Any other construction would provide incentive for a company competing in the money market to enter a holding company arrangement, a corporate form clearly not favored by the 1935 Congress which considered banning holding companies altogether. See 79 Cong. Rec. 10362-5 (1935) (remarks of Congressman Wolverton).

## CONCLUSION

The judgment of the Court of Appeals remanding the order of the Commission subjects public utilities to an undue burden of multiplicitous antitrust litigation, impedes unnecessarily their ability to meet the energy demands of the public, ignores the limited scope of Section 204 and the adequacy of antitrust protections under other provisions of the Federal Power Act, and adds to the growing conflict in decisions concerning the coordination of antitrust and regulatory policies. For these reasons that judgment should be reversed.

Respectfully submitted.

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GEORGE W. MCHENRY, JR.,
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I authorize the filing of the above brief.

ERWIN N. GRISWOLD,
*Solicitor General.*

AUGUST 1972.

## APPENDIX

The Federal Power Act provides in pertinent part:

Section 207, 16 U.S.C. § 824f

§ 824f. Ordering furnishing of adequate service

Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. June 10, 1920, c. 285, § 207, as added Aug. 26, 1935, c. 687, Title II, § 213, 49 Stat. 853.

The Interstate Commerce Act provides in pertinent part:

Sections 5(2)(a)(i) and 20a, 49 U.S.C. §§ 5(2)(a)(i) and 20a

§ 5, par. (2). Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part

thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise;

* * * *

§ 20a. Securities of carriers; issuance, etc.

Carrier defined

(1) As used in this section, the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter, or a sleeping-car company which is subject to this chapter.

Issuance of securities; assumption of obligations; authorization

(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collec-

tively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

Scope of commission's authority

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appro-

priate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

Form and contents of application; oath and signature

(4) Every application for authority shall be made in such form and contain such matters as the commission may prescribe. Every such application, as also every certificate of notification hereinafter provided for, shall be made under oath, signed and filed on behalf of the carrier by its president, a vice president, auditor, comptroller, or other executive officer having knowledge of the matters therein set forth and duly designated for that purpose by the carrier.

Disposition of securities described in application, etc.

(5) Whenever any securities set forth and described in any application for authority or certificate of notification as pledged or held unencumbered in the treasury of the carrier shall, subsequent to the filing of such application or certificate, be sold, pledged, repledged, or otherwise disposed of by the carrier, such carrier shall, within ten days after such sale, pledge, repledge, or other disposition, file with the commission a certificate of notification to that effect, setting forth therein all such facts as may be required by the commission.

Notice of application to governors of States; intervention; hearings

(6) Upon receipt of any such application for authority the commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which the applicant carrier operates. The railroad commissions, public service, or utilities commissions, or other appropriate State authorities of the State shall have the right to make before the commission such representations as they may deem just and proper for preserving and conserving the rights and interests of their people and the States, respectively, involved in such proceedings. The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority.

Jurisdiction of commission as exclusive and plenary

(7) The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

Guaranty of securities

(8) Nothing herein shall be construed to imply any guaranty or obligation as to such securities on the part of the United States.

Issue of short-term notes; certificate of notification; proviso

(9) The foregoing provisions of this section shall not apply to notes to be issued by the car-

rier maturing not more than two years after the date thereof and aggregating (together with all other then outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding. In the case of securities having no par value, the par value for the purposes of this paragraph shall be the fair market value as of the date of issue. Within ten days after the making of such notes the carrier issuing the same shall file with the commission a certificate of notification, in such form as may from time to time be determined and prescribed by the commission, setting forth as nearly as may be the same matters as those required in respect of applications for authority to issue other securities: *Provided*, That in any subsequent funding of such notes the provisions of this section respecting other securities shall apply.

Reports by carriers as to securities or proceeds

(10) The commission shall require periodical or special reports from each carrier issuing any securities, including such notes, which shall show, in such detail as the commission may require, the disposition made of such securities and the application of the proceeds thereof.

Securities issued contrary to law void; effect; penalty

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued

or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney, or agent of the carrier who knowingly assents to or concurs in any issue

of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the commission's order or orders in the premises, or any application not authorized by the commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court.

Restrictions on actions of officers and directors; penalty

(12) It shall be unlawful for any person to hold the position of officer or director of more than one carrier, unless such holding shall have been authorized by order of the commission, upon due showing, in form and manner prescribed by the commission, that neither public nor private interests will be adversely affected thereby. It shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account. Any violation of these provisions shall be a misdemeanor, and on conviction in any United States

court having jurisdiction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court. Feb. 4, 1887, c. 104, Pt. I, § 20a, as added Feb. 28, 1920, c. 91, § 439, 41 Stat. 494; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Aug. 2, 1949, c. 379, § 10, 63 Stat. 487.

The Public Utility Holding Company Act of 1935 provides in pertinent part:

Sections 6, 7, 9, and 10, 15 U.S.C. §§ 79f, 79g, 79i, and 79j

§ 79f. Unlawful transactions by registered companies—Issuing, selling, or altering rights of stockholders to declaration

(a) Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

Exemptions from operation of subsection (a)

(b) The provisions of subsection (a) of this section shall not apply to the issue, renewal, or

guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor) if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other then outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and

sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) of this section shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on January 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) of this section by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such form and setting forth such of the information required in a declaration under section 79g of this title as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Selling from house to house; causing officer or employer of subsidiary to sell

(c) It shall be unlawful, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, for any registered hold-

ing company or any subsidiary company thereof, directly or indirectly,—

(1) to sell or offer for sale or to cause to be sold or offered for sale, from house to house, any security of such holding company; or

(2) to cause any officer or employee of any subsidiary company of such holding company to sell or cause to be sold any security of such holding company.

As used in this subsection the term "house" shall not include an office used for business purposes. Aug. 26, 1935, c. 687, Title I, § 6, 49 Stat. 814.

§ 79g. Declarations by registered companies in respect to security transactions—Contents

(a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 79f of this title, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

(1) such of the information and documents which are required to be filed in order to register a security under section 77g of this title, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such State laws as may apply to the act in question as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Effective date of declaration; order of Commission

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

Conditions precedent to permitting declaration to become effective

(c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly authorized by the appropriate court or courts; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of para-

graph (1) of this subsection would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions having permission of effectiveness

(d) If the requirements of subsections (c) and (g) of this section are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

Declaration regarding alterations, priorities, voting power, and other rights of security holders

(e) If the requirements of subsection (g) of this section are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

Order permitting declaration to become effective

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

Compliance with State laws as condition to permission of effectiveness

(g) If a State commission or State securities commission, having jurisdiction over any of the acts enumerated in subsection (a) of section 79f of this title, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected. Aug. 26, 1935, c. 687, Title I, § 7, 49 Stat. 815.

§ 79i. Acquisition of securities and utility assets and other interests

(a) Unless the acquisition has been approved by the Commission under section 79j of this title, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate under clause (A) of paragraph (11) of subsection (a) of section 79b of this title, of such com-

pany and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.

(b) Subsection (a) of this section shall not apply to—

(1) the acquisition by a public-utility company of utility assets the acquisition of which has been expressly authorized by a State commission; or

(2) the acquisition by a public-utility company of securities of a subsidiary public-utility company thereof, provided that both such public-utility companies and all other public-utility companies in the same holding-company system are organized in the same State, that the business of each such company in such system is substantially confined to such State, and that the acquisition of such securities has been expressly authorized by the State commission of such State.

(c) Subsection (a) of this section shall not apply to the acquisition by a registered holding company, or a subsidiary company thereof, of—

(1) securities of, or securities the principal or interest of which is guaranteed by, the United States, a State, or political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing;

(2) such other readily marketable securities within the limitation of such amounts,

as the Commission may by rules and regulations prescribe as appropriate for investment of current funds and as not detrimental to the public interest or the interest of investors or consumers; or

(3) such commercial paper and other securities, within such limitations, as the Commission may by rules and regulations or order prescribe as appropriate in the ordinary course of business of a registered holding company or subsidiary company thereof and as not detrimental to the public interest or the interest of investors or consumers.

Aug. 26, 1935, c. 687, Title I, § 9, 49 Stat. 817.

§ 79j. Approval of acquisition of securities and utility assets and other interests—Contents of application

(a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interest in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the officers or directorships held, and securities owned, held, or controlled, by them in other companies,

(D) the bonus, profit-sharing and voting trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled, directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof or its relations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may be required under section 79e of this title from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any other interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions affecting approval

(b) If the requirements of subsection (f) of this section are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable nor does not bear a fear relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions barring approval

(c) Notwithstanding the provisions of subsection (b) of this section, the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 79h of this title or is detrimental to the carrying out of the provisions of section 79k of this title; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

Approval to be granted in reasonable time

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

Terms and conditions of order granting approval

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

Compliance with State laws as condition of approval

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 79k of this title. Aug. 26, 1935, c. 687, Title I, § 10, 49 Stat. 818.

The Clayton Act provides in pertinent part:

Sections 2, 3, 7, and 8, 15 U.S.C. §§ 13, 14, 18 and 19

§ 13. Discrimination in price, services, or facilities—Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where

either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in

restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time wherein response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

Burden of rebutting prima-facie case of discrimination

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Payment or acceptance of commission, brokerage or other compensation

(c) It shall be unlawful for any person engaged in commerce, in the course of such com-

merce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against

another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Knowingly inducing or receiving discriminatory price

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, § 2, 38 Stat. 730; June 19, 1936, c. 592, § 1, 49 Stat. 1526.

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor

or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

§ 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock of other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall, acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about,

the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section

shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board. Oct. 15, 1914, c. 323, § 7, 38 Stat. 731; Dec. 29, 1950, c. 1184, 64 Stat. 1125.

§ 19. Interlocking directorates and officers

No private banker or director, officer, or employee of any member bank of the Federal Reserve System or any branch thereof shall be at the same time a director, officer, or employee of any other bank, banking association, savings bank, or trust company organized under the National Bank Act or organized under the laws of any State or of the District of Columbia, or any branch thereof, except that the Board of Governors of the Federal Reserve System may by regulation permit such service as a director, officer, or employee of not more than one other such institution or branch thereof; but the foregoing prohibition shall not apply in the case of any one or more of the following or any branch thereof:

(1) A bank, banking association, savings bank, or trust company, more than 90 per centum of the stock of which is owned directly or indirectly by the United States or by any corporation of which the United States directly or indirectly owns more than 90 per centum of the stock.

(2) A bank, banking association, savings bank, or trust company which has been placed formally in liquidation or which is in the hands of a receiver, conservator, or other official exercising similar functions.

(3) A corporation, principally engaged in international or foreign banking or banking in a dependency or insular possession of the United States which has entered into an agreement with the Board of Governors of the Federal Reserve System pursuant to sections 601-604 of Title 12.

(4) A bank, banking association, savings bank, or trust company, more than 50 per centum of the common stock of which is owned directly or indirectly by persons who own directly or indirectly more than 50 per centum of the common stock of such member bank.

(5) A bank, banking association, savings bank, or trust company not located and having no branch in the same city, town or village as that in which such member bank or any branch thereof is located, or in any city, town, or village contiguous or adjacent thereto.

(6) A bank, banking association, savings bank, or trust company not engaged in a

class or classes of business in which such member bank is engaged.

(7) A mutual savings bank having no capital stock.

Until February 1, 1939, nothing in this section shall prohibit any director, officer, or employee of any member bank of the Federal Reserve System, or any branch thereof, who is lawfully serving at the same time as a private banker or as a director, officer, or employee of any other bank, banking association, savings bank, or trust company, or any branch thereof, on August 23, 1935, from continuing such service.

The Board of Governors of the Federal Reserve System is authorized and directed to enforce compliance with this section, and to prescribe such rules and regulations as it deems necessary for that purpose.

No person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the

aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this Act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this Act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment. Oct. 15, 1914, c. 323, § 8, 38 Stat. 732; May 15, 1916, c. 120, 39 Stat. 121; May 26, 1920, c. 206, 41 Stat. 626; Mar. 9, 1928, c. 165, 45 Stat. 253; Mar. 2, 1929, c. 581, 45 Stat. 1536; Aug. 23, 1935, c. 614, § 329, 49 Stat. 717.

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